IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 214 of 1998
WITH
COMPANY PETITION No 68 of 1999
COMPANY PETITION No 83 of 1999
COMPANY PETITION No 229 of 1999
COMPANY PETITION No 242 of 1999
COMPANY PETITION No 280 of 1999
COMPANY PETITION No 328 of 1999
WITH
COMPANY APPLICATION No 103 of 1999

IN

COMPANY PETITION No 83 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOYAL M.G. GASES LTD.

Versus

HAMCO MINING & SMELTING LTD.

Appearance:

1. COMPANY PETITION No. 214 of 1998
MR NAVIN K PAHWA for Petitioner No. 1
MR AB VYAS for Respondent No. 1

2. COMPANY PETITION No. 68 of 1999
MS PJ DAVAWALA for Petitioner No. 1
MR AB VYAS for Respondent No. 1
3. COMPANY PETITION No. 83 of 1999
MR PG DESAI for Petitioner No. 1
MR AB VYAS for Respondent No. 1
4. COMPANY PETITION No. 229 of 1999
MR PC KAVINA for Petitioner No. 1
MR AB VYAS for Respondent No. 1
5. COMPANY PETITION No. 242 of 1999
MR ASHOK L SHAH for Petitioner No. 1
MR AB VYAS for Respondent No. 1
6. COMPANY PETITION No. 280 of 1999
MR JV JAPEE for Petitioner No. 1
MR AB VYAS for Respondent No. 1
7. COMPANY PETITION No. 328 of 1999
MR SP SEN for Petitioner No. 1
MR AB VYAS for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 11/01/2005

COMMON ORAL JUDGEMENT

All these petitions are filed by the petitioning creditors for winding up of the respondent Company.

2. This Court (Coram :- M.S. Shah, J.) has passed an order on 17.12.1999 in Company Petition No. 214 of 1998 admitting the petition and ad-interim relief was granted in terms of para 10 (D) of the petition. The order of advertisement was, however, deferred till 27.12.1999. On 27.12.1999, this Court has passed further order and appointed the Official Liquidator attached to this Court as the Provisional Liquidator for taking over the possession of the properties of the respondent company under the provisions of the Companies Act, 1956. The O.L. was directed to make the complete inventory of the plant and machinery and he was directed to exercise all the powers conferred upon him under Section 457 read with Section 450 (3) of the Act. This Court has further observed that the advertisement containing the notice of this petition would not be published before 24.01.2000 and the petitioner of Company Petition No. 214 of 1998 was directed to publish the advertisement whereas the petitioners of Company Petitions No. 68 and 83 of 1999 were directed to deposit an amount of Rs.25,000/- initially subject to reimbursement.

3. Thereafter, the respondent Company has moved

Company Application No. 60 of 2000 in Company Petition No. 214 of 1998. This Court vide its order dated 25.02.2000 granted ad-interim relief to the effect that the O.L. who has been appointed as the Provisional Liquidator of the respondent company should not take possession of the assets of the respondent company and if the possession has already been taken, he shall forthwith return the assets to the respondent Company. The respondent Company was directed to pay a sum of Rs.20,000/- to the O.L. by way of cost which must have been incurred by the O.L.

4. Thereafter, this Court has passed further order on 03.03.2000 in Company Application No. 60 of 2000 recording the statement of the learned counsel appearing for the respondent Company that the Company shall not deal with or dispose of any of its movable and immovable assets except stock in trade so as to do the business of the Company. An undertaking to the above effect of the Managing Director of the Company was ordered to be filed.

5. In view of the orders passed by this Court on 25.02.2000 and 03.03.2000 in Company Application No. 60 of 2000, the said application was disposed of by the Court on 09.04.2001. The fact still remained that the appointment of the O.L. as the Provisional Liquidator of the respondent company by an order dated 27.12.1999 in Company Petition No. 214 of 1998 with Company Petitions No. 68 and 83 of 1999 was neither challenged nor disturbed.

6. Thereafter, this matter and all other matters filed against the respondent Company were adjourned from time to time on the ground that the respondent Company was before BIFR. On 10.10.2002, this Court has passed an order recording the statement made by one of the counsels appearing for the petitioning creditor in one of the Company petitions that the respondent company was no more before BIFR and, therefore, there was no impediment for this Court to proceed with all these matters and decide the same in accordance with law.

7. This Court has further passed an order on 10.02.2003 in Company Petition No. 214 of 1998 recording the statement of Mr. Apurva Vyas, learned advocate appearing for the respondent Company that the case of the respondent has been rejected by the BIFR and, therefore, the respondent Company had filed an appeal before AAIFR and the said appeal has been subsequently heard and the case has been remanded to BIFR. This Court has observed that the statement made by Mr. Apurva Vyas was

contradicted by learned advocate Ms. P.J. Davawala by stating the fact that the appeal which was filed by the respondent-company was in fact dismissed on 23.05.2002. The Court has further recorded the fact that a copy of the order passed by AAIFR has been produced for perusal of the Court. This Court has, therefore, directed the respondent-Company to file an affidavit on or before 21.02.2003.

8. Pursuant to the aforesaid order, an affidavit is filed by Smt. Kusum B. Patel, wife of Shri B.M. Patel, Chairman of respondent-Company, stating that the company's case is pending before BIFR vide registration No. 118 of 2003 which was registered on 17.12.2002 as per the intimation received from the office of BIFR. A copy of the intimation dated 11.03.2003 from the Registrar of BIFR is attached along with the said affidavit. Along with the said affidavit, the order passed by the Bombay High Court in Summons for Judgment 60/99 in Summary Suit No. 3646/98 was also attached. However, the said proceedings were stayed by the Bombay High Court, on the basis of copy of the letter dated 13.01.2000, produced by the respondent-Company to show that the respondent-Company has approached BIFR and reference under Section 15 (1) of the Act was pending. Even it appears from the letter dated 11.03.2003 of the Registrar, BIFR that the respondent-Company was directed to send a copy of the Form-A along with its enclosures filed by the respondent-Company to the State Government, Banks and Financial Institutions and compliance report within 15 days from the date of receipt of the said letter. The respondent-company was also directed to send the factory license duly renewed up to 31.12.2002 and Minutes of A.G.M., adopting audited accounts as on 30.09.1999 on priority basis. Thereafter, these matters were notified for hearing from time to time. As and when the matters are placed for hearing, either no one appeared on behalf of the respondent-Company or leave note/sick note has been filed before the Court. This Court has, therefore, passed an order on 25.06.2004 directing the respondent Company to place on record the correct facts with regard to the status of the respondent-Company before the BIFR and as a last chance the matter was adjourned to 06.07.2004.

9. On 6.7.2004, no one was present on behalf of the respondent-Company. On the other hand, learned advocates appearing for the petitioners in all these petitions were present and they have insisted for the order of advertisement and for appointment of the Provisional Liquidator. When the Court started dictating the order,

Mr. Apurva Vyas, learned advocate appearing for the respondent Company has appeared and requested that the matter is still pending before BIFR. He has placed reliance on the affidavit filed on 03.07.2003 in Company Petition No. 214 of 1998 with Company Petitions No. 68 and 83 of 1999 and 242 of 1999. He has also invited the attention of this Court towards the letter dated 11.03.2003, received by the respondent Company from the Registrar, BIFR, a copy of which was produced along with the said affidavit. While going through the said affidavit and the letter of BIFR attached therewith, the Court found that certain details were called for from the respondent-Company and certain directions were also issued. This letter was of 11.03.2003 and till 06.07.2004 it was not known as to whether the directions given in the said letter or the compliance called for by BIFR have been carried out or not. Mr. Vyas was also not in a position to make any positive statement or lead any evidence in this regard. Since there was a systematic attempt on the part of the respondent-Company to avoid the hearing of all these petitions or to place the correct facts before the Court about the pendency of its matter before BIFR, this Court was not inclined to grant any further time in the matter and proceeded with the hearing on merits. Since the order regarding appointment of Provisional Liquidator has already been passed by this Court and that has not been disturbed, the O.L. was directed to work as a Provisional Liquidator of the respondent Company and to exercise all powers conferred upon him under the Provisions of the Act. Earlier, O.L. was prevented from taking possession of the assets of the respondent-Company. However, looking to the subsequent development and failure of the respondent-Company to discharge its liabilities towards all these petitioning creditors, the Court directed the O.L. to take possession of the respondent Company and to make inventory of the assets of the company. The order of advertisement in Company Petition No. 214 of 1998 was also passed directing publication of advertisement in English daily newspaper 'Indian Express' - Ahmedabad edition and Gujarati daily newspaper 'Gujarat Mitra' Surat edition. The publication of advertisement in Government Gazette was dispensed with. In this group, as some of the petitions were not admitted, the Court vide its order dated 06.07.2004 admitted those petitions and they were ordered to be listed for final hearing along with Company Petition No. 214 of 1998 on 13.08.2004.

10. However, the O.L. could not effect the advertisement as directed vide order dated 06.07.2004. The Court has passed further order on 26.08.2004

directing the O.L. to effect the publication of advertisement as directed by the Court on 06.07.2004 fixing the date of final hearing on 29.09.2004. Pursuant to the aforesaid order, O.L. has filed his report on 29.09.2004 stating that he has issued the advertisement on 14.09.2004 as directed and the copies of the newspapers cuttings were annexed along with his report. He has further stated in his report that no communication was received from anyone with regard to the said advertisement.

11. The above matters are listed for final hearing since all the legal formalities were over. At the time when the matter is taken up for final hearing, nobody appeared on behalf of respondent company to defend the winding up petitions.

12. In Company Petition No. 214 of 1998, the petitioning creditor, namely, Goyal M.G. Gases Limited has stated that the respondent company was indebted to the petitioner to the tune of Rs. 1,25,24,591/- together with interest with effect from the date of repayment as per the terms and conditions of the Inter-Corporate deposit agreement dated 17.04.1998. The respondent Company has handed over Cheque No. 486450 dated 16.07.1998 for an amount of Rs.1,50,00,000/-. The said cheque was dishonored and was returned to the petitioner with endorsement 'refer to drawer' vide bank advice dated 07.08.1998. The petitioner has thereafter issued notice under Section 138 of the Negotiable Instrument Act against the respondent Company and has also initiated appropriate criminal action against the Company, Directors and responsible Officers. Subsequent to the issuance of the notice, part payment was made by the respondent company. However, subsequently payment was not made and hence, the statutory notice under the Act was issued by the petitioner on 01.09.1998 claiming the aforesaid amount of Rs.1,25,24,591/- together with interest and since no payment was made, the winding up petition was filed against the Company.

13. In Company Petition No. 68 of 1999, the petitioning creditor, namely, Sicom Limited, has stated that the respondent Company was indebted to the petitioner to the tune of Rs.60,00,000/- towards the principal and the sum of Rs.7,66,817/- towards interest as on 30.11.1998 aggregating to Rs.67,66,817/- under the Corporate Loan of Rs. 3 Crores together with further interest thereon from 01.12.1998 till full payment or realisation thereof. The petitioner gave statutory notice on 02.11.1998 which was duly received by the

respondent company. Here also, the cheques issued by the respondent company towards payment of other dues were returned dishonored for non-payment. The petitioner was, therefore, of the view that the respondent Company was hopelessly in insolvent condition and it was fit and proper that the said company should be wound up under the Provisions of Section 433 & 434 of the Companies Act, 1956.

14. In Company Petition No. 83 of 1999, the petitioning creditor, namely, M/s. Ranbaxy Laboratories Ltd., has stated that the petitioner has issued statutory notice on 25.01.1999 calling upon the respondent Company to pay a sum of Rs.269.49 Lacs along with interest @ 30% p.a. and @ 30.65% from 11.01.1999 till date of payment/realisation. Since the respondent company did not make the payment due and payable to the petitioner, the present winding up petition was filed before this Court alleging that the respondent company is commercially insolvent and admittedly unable to pay its dues. It was submitted that it is just and equitable that the Company be ordered to be wound up by this Court under the Provisions of the Act.

15. In Company Petition No. 229 of 1999, the petitioning creditor, namely, Ceat Financial Services Limited, has stated that the petitioner issued statutory notice on 25.03.1999 on the respondent Company calling upon him to pay an amount of Rs.27,70,747/- outstanding on 25.03.1999. Over and above this, the respondent was also liable to pay an amount of Rs.28,34,477/- being the amount of overdue bill, delayed payment charges, overdue amount along with interest as on 30.11.1998. It was also stated in the petition that as on 23.07.1999, the Company was indebted to the petitioner in the sum of Rs.60,70,576/- as per the particulars of the claim along with delayed payment charges, other charges and expenses from that date till the date of actual payment. It was further stated that the respondent Company failed miserably in making the payment of its bills liability and it has also caused breach of the agreement and has shattered the trust of the petitioner. The petitioner was, therefore, of the view that the respondent Company has become commercially insolvent and has no means to pay all its liabilities. If the respondent Company is not wound up, grave and irreparable harm and loss would be caused to the petitioner and to the general body of creditors.

16. In Company Petition No. 242 of 1999 filed by the petitioning creditor, namely, Mukund Global Finance

Limited, it has been stated that on the date of filing of the winding up petition, an amount of Rs. 7,30,884.61 was due and payable by the respondent company. Despite the service of statutory notice, the amount was not paid and hence, the winding up petition was filed.

17. In Company Petition No. 280 of 1999, the petitioning creditor, namely, M/s. Pinkhem Investment Company Pvt. Ltd., has stated that the petitioner has issued statutory notice on the respondent company on 21.06.1999 calling upon them to pay inter-corporate deposit of Rs.15,00,000/- together with interest accrued from 12.09.1998 @ 17% p.a. Despite the service of notice, the respondent has failed to make the payment which was due and payable to the petitioner and hence, the petitioner has filed the present winding up petition.

18. In Company Petition No. 328 of 1999, filed by the petitioning creditor, namely, Shri Anil Prabhakar Naik, it is stated that the petitioner has issued statutory notice which was duly received by the respondent on 03.08.1999 calling upon the company to pay an amount of Rs. 50,000/- with interest. It was alleged in the petition that the petitioner has been duped and cheated by the respondent Company and its Managing Directors and had been made to part with his hard earned money on the false assurance that the company will repay the dues with interest amount @ 15% p.a. Since the amount has not been paid, the winding up petition was filed before this Court.

19. Since several winding up petitions are filed against the respondent Company and the respondent company is unable to discharge its liabilities towards petitioning creditors and since there is no defence available with the respondent Company except to state that reference is pending before BIFR, which fact has also not been established despite several opportunities were granted by this Court, there is no other alternative for the Court but to pass winding up order in the matters. Accordingly, the respondent company is hereby ordered to be wound up. The O.L. was already directed earlier to work as Provisional Liquidator of the company and to take charge of the assets of the respondent company and also to prepare the inventory. If the possession is not taken over and the inventory is not prepared, the O.L. is hereby directed to take possession and prepare inventory, after intimating to the company as well as the secured creditors.

20. In view of above, all these petitions are

accordingly disposed of. Office is directed to place copy of this order in each of the remaining petitions.

21. In view of the order passed in these petitions, which interalia, includes Company Petition No. 83 of 1999, Company Application No. 103 of 1999 which was preferred in Company Petition No. 83 of 1999 does not survive and it is accordingly disposed of.

[K.A. PUJ, J.]

#Savariya#

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